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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/043,004	01/08/2002	Keith Forneck	72846	7400

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EXAMINER

TRAN LIEN, THUY

ART UNIT

PAPER NUMBER

1761

4

DATE MAILED: 08/29/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No. 10/043,004	Applicant(s) Forneck et al.
Examiner Lien Tran	Art Unit 1761



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1)  Responsive to communication(s) filed on Jan. 8, 2002.
- 2a)  This action is FINAL.      2b)  This action is non-final.
- 3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.
- 4)  Claim(s) 1-26 is/are pending in the application.
- 4a) Of the above, claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5)  Claim(s) \_\_\_\_\_ is/are allowed.
- 6)  Claim(s) 1-26 is/are rejected.
- 7)  Claim(s) \_\_\_\_\_ is/are objected to.
- 8)  Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9)  The specification is objected to by the Examiner.
- 10)  The drawing(s) filed on \_\_\_\_\_ is/are a)  accepted or b)  objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11)  The proposed drawing correction filed on \_\_\_\_\_ is: a)  approved b)  disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12)  The oath or declaration is objected to by the Examiner.

### Priority under 35 U.S.C. §§ 119 and 120

- 13)  Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)  All b)  Some\* c)  None of:

1.  Certified copies of the priority documents have been received.
2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\*See the attached detailed Office action for a list of the certified copies not received.

- 14)  Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).  
a)  The translation of the foreign language provisional application has been received.
- 15)  Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

### Attachment(s)

- 1)  Notice of References Cited (PTO-892)      4)  Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2)  Notice of Draftsperson's Patent Drawing Review (PTO-948)      5)  Notice of Informal Patent Application (PTO-152)
- 3)  Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_      6)  Other: \_\_\_\_\_

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1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459

(1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. Claims 1-14 and 23-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Berkowitz et al in view of Rudel.

Berkowitz et al disclose a bread comprising flour, water, vegetable shortening, glycerol, yeast, sugar, salt, potassium sorbate and cream flavor ( see examples 1 and 2). The bread has an Aw within the range of .70 to .95. The shelf life of the bread is enhanced by reduction of interpackage oxygen concentration; the residual oxygen is reduced to at least 1.6% but preferably .2% or less. (See column 3)

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Berkowitz et al do not disclose the bread is a flat bread, the inclusion of corn syrup solids, baking powder and the amounts of ingredients as claimed.

Rudel discloses a bread product. Rudel discloses corn syrup solid is a known sweetening agent to use in bread. He also discloses chemical leavening agent is well known. (See columns 9-10)

It would have been obvious to one skilled in the art at the time of the invention to shape the dough of Berkowitz et al into any shape and size to make different variety of bread. Flat bread is just bread with a flat shape; it would have been obvious to form the dough into a flat shape if it is desired to make a flat bread. It would also have been obvious to make the bread in any size desired depending on how small or large a loaf is desired. The limitation of “ without the use of antifogging agents or pyrrolidone-containing additives” does not define over Berkowitz et al because they do not include antifogging agents and the claim recites the alternative of one or the other. It would also have been obvious to use corn syrup solids in the Berkowitz et al dough because they disclose adding a sweetening agent and corn syrup solids is a well known sweetening agent that is used in bread dough as shown by Rudel. It would also have been obvious to add baking powder along with the yeast to have a combined leavening effect because both yeast and baking powder are known leavening agents to use in bread dough. The amounts of ingredients used in a dough recipe vary depending on the type of bread. It would have been within the skilled of one in the art to determine the amounts through routine experimentation depending on the type of bread made and the taste and texture desired. Additives such as calcium propionate for

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preservative, glycerides as emulsifier, acid and seasonings as taste modifier and cystein hydrochloride as dough conditioner are well known in the art; it would have been obvious to add the additives for their art-recognized functions. As to the product-by-process claims, determination of patentability in "product-by-process" claims is based on the product itself, even though such claims are limited and defined by process (see *In re Thorpe* 227 USPQ 964).

4. Claims 15-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Feldmeier et al in view of Berkowitz et al.

Feldmeier et al disclose a kit containing compartmentalized, hermetically sealed package with a refrigerated baked flour-containing component or dough component and other food components. The plurality of components are hermetically sealed from each other and from the environment. The hermetically sealed packages are sealed within a rigid tray. The dough components are hermetically sealed within a gas-flushed film container. The other food components can be meat, cheese, condiments etc... Each of the food components is separately compartmentalized, separately wrapped and/or hermetically sealed. Individual components could be gas flushed or vacuum sealed. On column 9, Feldmeier et al disclose a basic recipe of bread roll which comprises flour, shortening, wheat gluten, yeast, starch degrading enzyme, gum, egg white, monoglyceride and corn syrup. They also disclose gums such as guar, and xanthan can be added to improve the long-term texture of the crumb.

Feldmeier et al do not disclose a bread product having an Aw and containing glycerin as claimed. Also, Feldmeier do not exclude the antifogging agent.

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Berkowitz et al disclose a bread comprising of flour, water, vegetable shortening, glycerol, yeast, sugar, salt, potassium sorbate and cream flavor (see examples 1 and 2). The bread has an Aw within the range of .70 to .95.

The exclusion of the anti-fogging agent does not define over Feldmeier et al. Feldmeier et al disclose the anti-fogging agent further assists in maintaining freshness and retarding staling. By this disclosure, they recognize that without the anti-fogging agent, the product still has shelf stability but the anti-fogging agent enhances the shelf life. Thus, it would have been obvious to one skilled in the art to exclude or include the fogging agent depending on the cost/benefit factor. The adding of the fogging agent increases the cost of production. If the product is intended for sale in a short period of time and the benefit offered by the fogging agent is not needed, it would have been obvious to exclude the fogging agent. It would have been obvious to exclude the fogging agent depending if the cost outweighs the benefit or the benefit outweighs the cost. It would also have been obvious to one skilled in the art to package the bread product of Berkowitz et al in the package of Feldmeier if the properties of the Berkowitz et al bread are desired; the selection of the baked component would have been an obvious matter of choice. It would also have been obvious to one skilled in the art at the time of the invention to shape the dough of Berkowitz et al into any shape and size to make different variety of bread. Flat bread is just bread with a flat shape; it would have been obvious to form the dough into a flat shape if it is desired to make a flat bread. It would also have been obvious to make the bread in any size desired depending on how small or large a loaf is desired. It would also have been obvious to use corn

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syrup solids in the Berkowitz et al dough because they disclose adding a sweetening agent and corn syrup solids is a well known sweetening agent that is used in bread dough as Feldmeier disclose a bread dough containing corn syrup solids. It would also have been obvious to add baking powder along with the yeast to have a combined leavening effect because both yeast and baking powder are known leavening agents to use in bread dough. The amounts of ingredients used in a dough recipe vary depending on the type of bread. It would have been within the skilled of one in the art to determine the amounts through routine experimentation depending on the type of bread made and the taste and texture desired. Additives such as calcium propionate for preservative, glycerides as emulsifier, acid and seasonings as taste modifier and cystein hydrochloride as dough conditioner are well known in the art; it would have been obvious to add the additives for their art-recognized functions. As to the product-by-process claims, determination of patentability in "product-by-process" claims is based on the product itself, even though such claims are limited and defined by process (see In re Thorpe 227 USPQ 964). As to the inclusion of pyrrolidon-containing additive, it would have been obvious to one skilled in the art to exclude such as additive when the dough is package in the Feldmeier et al package because the use of such additive is to enhance shelf stability and the package of Feldmeier et al already provides enhanced shelf life.

5. Claims 25-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Feldmeier et al in view of Berkowitz et al.

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Feldmeier et al disclose a kit containing compartmentalized, hermetically sealed package with a refrigerated baked flour-containing component or dough component and other food components. The plurality of components are hermetically sealed from each other and from the environment. The hermetically sealed packages are sealed within a rigid tray. The dough components are hermetically sealed within a gas-flushed film container. The other food components can be meat, cheese, condiments etc... Each of the food components is separately compartmentalized, separately wrapped and/or hermetically sealed. Individual components could be gas flushed or vacuum sealed. On column 9, Feldmeier et al disclose a basic recipe of bread roll which comprises flour, shortening, wheat gluten, yeast, starch degrading enzyme, gum, egg white, monoglyceride and corn syrup. They also disclose gums such as guar, and xanthan can be added to improve the long-term texture of the crumb.

Feldmeier et al do not disclose a bread product having an Aw and containing glycerin as claimed.

Berkowitz et al disclose a bread comprising of flour, water, vegetable shortening, glycerol, yeast, sugar, salt, potassium sorbate and cream flavor (see examples 1 and 2). The bread has an Aw within the range of .70 to .95.

It would also have been obvious to one skilled in the art to package the bread product of Berkowitz et al in the package of Feldmeier if the properties of the Berkowitz et al bread are desired; the selection of the baked component would have been an obvious matter of choice.

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It would also have been obvious to one skilled in the art at the time of the invention to shape the dough of Berkowitz et al into any shape and size to make different variety of bread. Flat bread is just bread with a flat shape; it would have been obvious to form the dough into a flat shape if it is desired to make a flat bread. It would also have been obvious to use corn syrup solids in the Berkowitz et al dough because they disclose adding a sweetening agent and corn syrup solids is a well known sweetening agent that is used in bread dough as Feldmeier disclose a bread dough containing corn syrup solids. It would also have been obvious to add baking powder along with the yeast to have a combined leavening effect because both yeast and baking powder are known leavening agents to use in bread dough. The amounts of ingredients used in a dough recipe vary depending on the type of bread. It would have been within the skilled of one in the art to determine the amounts through routine experimentation depending on the type of bread made and the taste and texture desired. Additives such as calcium propionate for preservative, glycerides as emulsifier, acid and seasonings as taste modifier and cystein hydrochloride as dough conditioner are well known in the art; it would have been obvious to add the additives for their art-recognized function.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien Tran whose telephone number is 703-308-1868. The examiner can normally be reached on Wed-Fri. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9310.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

August 25, 2002

  
LIEN TRAN  
PRIMARY EXAMINER  
